In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 620

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS L. SUTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN REPLY TO BRIEF IN OPPOSITION

Respondent has filed a brief in opposition which tends to blur, rather than meet, the issues presented by the petition. The purpose of this memorandum is to reestablish those issues and to correct the inaccuracies contained in respondent's brief.

As its main point, the petition calls into question the jurisdiction of the court below to determine technical *factual* issues of military status involving purely military considerations. Respondent charges that the Government is "less than candid" (Brief in Opp., p. 12) in stating that the instant case is the first involving this question in which review could be sought

and then attempts to bolster this charge by stating that "the Court of Claims has awarded judgments for retired pay [including disability retired pay] due officers of the armed services for at least seventy-five years" (Brief in Opp., p. 12). This ambiguous statement avoids the real issue in this case—that the decision of the Court of Claims rests on a *factual* determination and not on the resolution of a true question of law. Of course, the United States concedes, and has long conceded, the jurisdiction of the court below over questions of computation of retired pay *involving construction of statutes and questions of law.* See, *e. g., Captain Tyler's Case,* 16 C. Cls. 223 (incorrectly cited by respondent as 15 C. Cls. 223); *Cloud* v. *United States,* 43 C. Cls. 69.[1] Into this category of cases involving construction of statutes and questions of law fall two of the three cases which respondent cites in support of its charge of lack of candor on petitioner's part. In *Vaughn* v. *United States,* 147 F. Supp. 280 (C. Cls.), the sole issue raised was the statutory power of a Disability Review Board to find an officer disabled where he had previously been found disabled (but not in line of duty) by the armed services. In *Register* v. *United States,* 131 C. Cls. 98, the claimant had in fact been found disabled by the armed services and the court ruled, as a matter of law, that aggravation of illness or incapacity renders the incapacity an incident of serv-

[1] Both *Captain Tyler's Case, supra,* and the *Cloud* case, *supra,* involved only the question of the proper amount of retired pay to be paid to retired officers. In both cases, only questions of statutory construction were presented.

ice. Neither case squarely or properly raised the issue of factual determinations of status. The third case, *Prince* v. *United States*, 127 C. Cls. 612, was a tax case, outside the main stream of these cases the defense of which is charged to the Court of Claims Section of the Civil Division of the Department of Justice. The *Prince* case involved the status issue only as ancillary to the tax question and it was thus considered by the Solicitor General as not a proper case in which to bring the status question before this Court. The case at bar, therefore, is the first, in the line of cases beginning with *Lemly* v. *United States*, 109 C. Cls. 760, in which there was a square holding by the court below that it possessed power to make factual determinations as to military status, and that square holding was both adverse to the Government and final.[2]

2. As it blurs the jurisdictional question raised by the petition, so does respondent's brief blur the law applicable to this and other classes of litigation. Respondent cites an indiscriminate mass of cases in support of its proposition that "arbitrary, capricious and unlawful acts of administrative officers are subject to judicial review" (Brief in Opp., p. 11). Not

[2] The Brief in Opposition appears to suggest that 32 pending cases, in all of which the court below is asked to replace the judgment of the military with its own, is an "infinitesimal number * * * so insignificant as to be beneath this Court's concern" (Brief in Opp., p. 12). But respondent does not deal with the basic problem stated in the petition (pp. 16, 20)—that of continuing and widening interference with the military's past, present and future function of determining the status of its own members.

a single one of the cases cited involves the question of factual determinations of military status—the principal issue involved in the case at bar. Moreover, upon examination, no case cited by respondent contains a holding in support of respondent's proposition. For example, it was held in *Meadows* v. *United States,* 281 U. S. 271, that a determination by the Veterans Administration as to reinstatement of lapsed life insurance was final and conclusive, and it is nowhere suggested in the opinion that the determination is subject to judicial review in any way; in *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, this Court held the Court of Claims without jurisdiction to review special tax assessments; *United States* v. *Hvoslef,* 237 U. S. 1, holds a tax on charter parties unconstitutional; the question in *McLean* v. *United States,* 226 U. S. 374, was the interpretation of the language of a private bill;[3] and in *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, where the question was one of classification of mail matter, this Court cited its prior holding in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325: "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." It should also be observed that in *Dismuke* v. *United States,* 297 U. S. 167, unlike the case at bar, the sole question was one of

[3] See also *United States ex rel. Parish* v. *MacVeagh,* 214 U. S. 124.

the meaning of a statute (whether service as a deputy marshal was service of the United States) and again, unlike the present case, there was no dispute as to the facts.

3. Finally, respondent contends that Congress intended that there be judicial review of the actions of Boards for the Correction of Military Records (Brief in Opp., pp. 16–23). The argument in support of this contention follows that in an article by William K. Jones which appears in 57 Columbia Law Review 917.[4] Mr. Jones' article, "Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges", was recently called to this Court's attention by a Reply Brief filed on behalf of petitioner in No. 80, *Harmon* v. *Brucker*.[5] In this Reply Brief, the point made was that the legislative history showed that the decisions of Boards for the Correction of Military Records were intended to be subject to judicial review. On this issue, the Government has filed a Supplemental Memorandum for the Respondent in Nos. 80 and 141. In that Supplemental Memorandum, at pp. 3–17, the legislative history bearing on the question of reviewability of these Boards is explored, and it is shown that the Board's

[4] Cf. Brief in Opposition, pp. 17–23, with 57 Columbia Law Review 917, 967–970.

[5] The issues presented in *Harmon* v. *Brucker* and the related case, *Abramowitz* v. *Brucker*, No. 141, are, of course, different from those presented in this case. However, those cases do involve, as one point of argument, the reviewability of the actions of Boards for the Correction of Military Records, the primary question presented in this petition.

decisions were not intended to be judicially reviewed. We respectfully refer the Court to that Supplemental Memorandum for our answer to this contention of the respondent in the present case.

Respectfully submitted.

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